No. 32961-5-III

COURT OF APPEALS DIVISION III

IN THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

JOEL M. GROVES, Appellant

APPEAL FROM THE SUPERIOR COURT

OF KITTITAS COUNTY

BRIEF OF APPELLANT

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253-445-7920

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2. Was the evidence insufficient to sustain the conviction for drive-by shooting?

3. Was the evidence insufficient to sustain a conviction for felony harassment?

4. Was the evidence insufficient to sustain a conviction for unlawful possession of a firearm?

5. Did the trial court exceed its statutory authority when it imposed a firearm enhancement of 36 months for the drive-by shooting conviction ?

6. Did the trial court exceed its statutory authority when it imposed a sentence that exceeded the statutory maximum for the offense of felony harassment ?

II. STATEMENT OF FACTS

Procedural Facts and Rulings

The Kittitas County Prosecutor charged Joel Groves by amended information with assault in the first degree, drive-by shooting, felony harassment, and unlawful possession of a firearm in the first degree, with firearm enhancements on counts 1, 2 and 3. (CP 178-179).

Mr. Groves submitted motions to dismiss for inability to make a prima facie case, and selective prosecution, based on his criminal history with the Kittitas County prosecutor's office. (CP 34; 181). The trial court denied both motions. (1RP 26; 192).

EYE WITNESS TESTIMONY

During the summer of 2014, 17 year olds Ryan Smith and Zack Koback posted insulting comments on each other's Facebook pages. (3RP 502;506). At some point, close to July 8, 2014, 20-year -old Daqwon Kessay became involved in the exchange of insults. (2B RP 361; 3RP 510). Smith testified he and Koback texted one another on July 8th and he came to the conclusion the only way to resolve the argument was by a physical fight. (2B RP 361; 3RP 511). Joel Groves drove Koback and Koback's friend, Jordan Hanson, to DaQwon Kessay's apartment. (6B RP 1563). Groves was in a relationship with Koback's mother. (3B RP 676).

That same evening Ryan Smith, Devon Lowe, Blake Campbell and Scott Adams met up at Kessay's apartment sometime between 8 p.m. and 9 p.m. to play video games and visit. (3B RP 364). At some point, Devon Lowe heard someone banging on the apartment door. He opened it and saw Koback standing there wearing brass knuckles. (3 RP 460). He shut the door and called Kessay. (2B RP 365-67). Kessay grabbed his loaded semiautomatic pistol and partially opened the door. (2B RP 367;369;373).

The apartment manager, Jessica Felke, was on her porch, about 190 feet away from Kessay's apartment. (4B 1088). She testified she called 9-1-1 when she heard yelling at Kessay's apartment. (3B RP 752). She watched the entire event and identified a skinny young man as the individual who both banged on and later shot at the door. (3B RP 755;766). After the shots, she saw the individuals pile back into the car, and believed that the shooter ran to the east side of the complex. (3B RP 763). She saw young men from inside the apartment run out, one left on a skateboard and the others left in a car. (3B RP 763;769).

Kessay testified when he partially opened the door he saw a car parked in a parking stall to the right of the front door. (2B RP 374-75). The passenger side door was open ajar. (2B RP 375). He glimpsed a figure, about ten feet away from him, who appeared "looking busy in the car." (2B RP 377; 417). He reported that from his perspective it seemed the individual was minding his own business, cleaning his car, and had nothing to do with the argument. (2B RP 401). He did not see the individual's face, but did see he had a 4 inch green tattoo on the right arm bicep. (2B RP 377;400).

Kessay and Koback argued for about five minutes. (2B RP 368;370). Kessay thought he might have seen Hanson standing nearby, but was not sure. (2B RP 372-73). Expecting to engage in a fistfight with Koback, he alternated between telling Koback to leave and agreeing to fight him in the parking lot. (2B RP 372).

He heard someone tell him to put down his gun and come outside, presumably to fight. (2B RP 394). He heard Koback tell someone that Kessay had a gun. (2B RP 378). He opened the door a little wider to see who Koback was talking to, and saw an arm and the barrel of a black gun. (2B RP 377-78;393). He did not see who was holding the gun. (2B RP 378-79; 412). Lowe reported that he heard an older male voice say, "Dizzy, I got something for you." (3 RP 469). Kessay did not report ever hearing the comment.

Kessay slammed the door closed as he heard a gunshot. (2B RP 378). The bullet went through the door just below the handle. (4B RP 880). Kessay responded by firing two shots out his front door[1]. (2B RP 397; 5B RP 1346). Kessay testified he told police that he had only guessed that the person he had seen by the

[1] Detective Shull later located the gun Kessay used in an irrigation canal lying in the water, where he had hidden it. (4B RP 1020).

car was the person who fired the first shot. (2B RP 379-380). Police later asked him if he heard someone say the name "Joel" and he said he "clearly heard a different name, after the officer asked me if that was the name….And I told him that it was definitely Joe…I told him I didn't hear 'Joel'." (2B RP 395).

Nineteen-year-old Patrick Kennedy testified he had ridden his bike to Kessay's apartment. He saw Koback yelling and banging on Kessay's front door. (3 RP 586). He saw Hanson, standing to the right of the front door and an older man walking around off in the distance. (3 RP 587;596). He reported he heard the older man say, "Oh, I got something for you." (3 RP 591).

He was sure he saw the older man with a silver colored gun, on the passenger side of the car[2]. (3RP 608). However, he did not see who fired a gun or from where it was fired. (3RP 600;606). He had run away before any shots were fired. (3RP 599).

Scott Adams who was in Kessay's apartment said he heard a car pull up near Kessay's apartment. He saw Koback get out on the passenger side, another individual from the backseat and a third person from the driver's seat. (3 RP 554). He believed he

[2] The gun that was recovered from Sampson's garbage was a black revolver.

saw the driver fidgeting with something in his lap. (3 RP 554). He testified he looked directly at the driver's hands and recalled they were empty. (3 RP 560).

Koback testified Kessay had a gun in his hand when he opened his door. (3B RP 724-25). Koback stated that as he stood by the door, he thought the shot came from either behind him or next to him from behind. (3B RP 711). He was unsure where Hanson was, but remembered Hanson grabbing his sleeve and telling him to get to cover; he believed Hanson might have been inside the car when the gun was fired. (3B RP 730). Koback ran to the car. (3B RP 689-90). He said Mr. Groves handed him a gun and told him to put it in the car speaker. (3B RP 692-93). They drove back to Koback's home. (3B RP 694). Koback denied shooting the gun at Kessay, but admitted wearing the brass knuckles. (3B RP 694; 722).

Jordan Hanson testified he was high on drugs that day and had little memory of the events. (3B 656). Hanson testified that people often mistake him for an older male because of his deep voice. (3B RP 671).

Mr. Groves testified he drove Koback and Hanson to Kessay's apartment; he did not know Kessay or any of the other

young men at the apartment. (6B RP 1563). He did not see Koback with a gun and testified he himself does not own a gun. (6B RP 1560; 1565). Koback and Hanson got out of the car and he sat in the driver's seat, playing a game on his cell phone. (6B RP 1565). Groves said he heard a gunshot, and a door slam. (6B RP 1566). He got out of the car and yelled at the kids to get in the car. (6B RP 1567). One of the bullets went through his pant leg[3]. (6B RP 1567-68).

Groves testified that on the ride back to Koback's home he saw Koback trying to hide a gun in the car. (6B RP 1569). He told Koback he could not put the gun in the car. When they arrived home, he grabbed the gun and saw that one of the bullets had been fired. (6B RP 1570-71). He told Koback to get rid of the gun; he didn't want to know where Koback was going to dispose of it. (6B RP 1571-72).

RECOVERY OF WEAPON AND DNA EVIDENCE

On August 11th, a friend of Kathi Sampson (Koback's mother) called police to tell them he had found a handgun in the

[3] Kessay was initially charged with first degree assault, which was later amended to unlawful possession of a firearm and unlawful discharge of a weapon, both misdemeanor offenses. (1RP 181-182).

trailer load of garbage at her home. Police recovered the weapon. (5 RP 1181).

Amy Jagmin of the Washington State Crime Patrol Lab tested the handgun for the presence of DNA. (4B RP 1007). The grip of the gun gave one profile that was a mixture of at least three people; it was inconclusive. (4B RP 993-94). The trigger of the gun was also swabbed and the entire profile was partial and a mixture of at least three people, and thus inconclusive. (4B RP 995). She obtained the same inconclusive results on the cylinder. (4B RP 996).

The hammer yielded a profile that showed there was a mixture of *at least* two people. (4B RP 1000). The minor profile was too low and/or complex for any comparisons to have been made. (4B RP 1010). The major profile from the hammer of the gun matched Mr. Groves' reference sample, and he could not be excluded. (4B RP 1001). She was not given any other person's DNA to compare with the two contributors to the DNA on the hammer. (4B RP 1006).). No fingerprints were obtained from the hammer. (4B RP 1007).

JURY INSTRUCTION

The jury was given instruction number 18:

> To convict the defendant of the crime of harassment, each of the following elements of the crime msut be proved beyond a reasonable doubt:
> (1) that on or about July 8, 2014, the defendant knowingly threatened to kill Da'Qwon Kessay immediately or in the future;
> (2) That the words or conduct of the defendant placed Da'Qwon Kessay in reasonable fear that the threat to kill would be carried out;
> (3) That the defendant acted without lawful authority; and
> (4) That the threat was made or received in the State of Washington.

(CP 359).

VERDICT AND SENTENCING

A jury found Mr. Groves guilty on each count, with a firearm enhancement added to counts 1, 2, and 3. (CP 368-374). At the sentencing hearing, the court ordered Count 1 (Assault 1) 279 plus a 60 month enhancement; Count 2 (Drive By Shooting) 101 months plus 36 month enhancement; Count 3 (Felony Harassment) 55 months plus an 18 month enhancement; and Count 4, (unlawful possession of a firearm first degree) 101 months. (7RP 1766). All counts to be served concurrently, with the enhancements to be served consecutive to one another. (7RP 1767). Mr. Groves makes this timely appeal. (CP 405).

III. ARGUMENT

A. The Evidence Was Insufficient To Sustain The Convictions For First-Degree Assault, Drive-By Shooting, Felony Harassment and Unlawful Possession of a Firearm.

A challenge to the sufficiency of the evidence may be raised for the first time on appeal as a due process violation. *State v. Hickman,* 135 Wn.2d 97, 954 P. 2d 900 (1998); *State v. Moore,* 7 Wn.App. 1, 499 P.2d 16 (1972). Under the due process rights guaranteed under both the Washington Constitution, Article 1 § 3, and the United States Constitution, Fourteenth Amendment, the State must prove every element of a crime beyond a reasonable doubt. *State v. Baeza,* 100 Wn.2d 487, 488, 670 P.2d 646 (1983). In a challenge to the sufficiency of the evidence, the test is whether, in viewing it in a light most favorable to the state, any rational trier of fact could fine the essential elements of the crime beyond a reasonable doubt. *State v. Green,* 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The reviewing court draws all reasonable inferences in favor of the State. *State v. G.S.,* 104 Wn.App. 643, 651, 17 P.3d 1221 (2001). Evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction;

it is not substantial evidence. *State v. Aten,* 130 Wn.2d 640, 927 P.2d 210 (1996).

1. The State Did Not Prove Beyond A Reasonable Doubt That Mr. Groves Committed Assault in The First Degree.

RCW 9A.36.011(1), reads in relevant part:

(1) A person is guilty of assault in the first degree if he or she with intent to inflict great bodily harm; (a) assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; (2) Assault in the first degree is a class A felony. Thus, the elements as charged in this case are (1) an assault (2) on another person (3) with a firearm (4) done with intent to inflict great bodily harm. *State v. Elmi,* 166 Wn.2d 209, 214-15, 207 P.3d 439 (2009). Intent is ascertained by determining whether a person acts with the 'objective or purpose to accomplish a result which constitutes a crime.' RCW 9A.08.010(1)(a).

The critical question in this case is whether, even in its best light, the State's evidence proved Mr. Groves committed the assault. The State's case in chief consisted of numerous witnesses who each stated they never saw who fired the gun toward Kessay.

Kessay saw an arm and the barrel of a black gun, but never saw who held the gun. (2B RP 377-79; 393;412).

Kennedy testified he saw an older man with a silver gun. However, he looked away for up to two minutes and started running before he heard any gunshots. (3RP 591-92;598-99). He never saw where the gun was fired from or who fired it. (3RP 600;606).

Scott Adams testified he looked directly at the driver's hands (presumably Mr. Groves), and they were empty. (3RP 560). Jessica Felke testified she saw the entire event unfold from her porch and called 9-1-1. She was adamant that the "skinny young man" who banged on Kessay's door was the same individual who fired a shot into the door. (3B RP 755; 766).

Koback testified he thought the shot either came from behind him, or next to him from behind, where he thought Hanson was standing. (3B RP 711; 730). He believed Hanson might have been in the car when the gun was fired. (3B RP 730). Hanson testified he didn't really remember anything from that day. (3B 656). Ryan Smith testified he did not see anyone shooting because he was hiding in the back of the apartment. (3RP 516).

The State presented evidence of DNA on the weapon. The body of the gun, grip, and trigger had a mixed profile of *at least 3* different sources. The hammer of the gun held a profile of *at least 2 different individuals*, one of which was Mr. Groves. The State's

expert could not determine how long the DNA had been on the hammer. More importantly, the expert noted there were no fingerprints on the hammer. In other words, it was consistent with Mr. Groves' explanation of handling the gun to see if it had been recently fired, rather than using his thumb to pull back the hammer to actually fire the weapon.

Koback testified Groves handed the gun to him and told him to put it in the car speaker. (3B RP 692-93). However, the gun was found a month later at Koback's home, where Groves did not live.

Even in the light most favorable to the State, the evidence does not establish beyond a reasonable doubt that Mr. Groves fired the weapon at Kessay. The absence of proof beyond a reasonable doubt requires dismissal of the conviction and charge. *Green,* 94 Wn.2d at 221. Similarly, the special verdict of being armed with a firearm while committing the crime must also be reversed. *State v. Wright,* 131 Wn.App. 474, 479, 127 P.3d 742 (2006).

2. The Evidence Was Insufficient To Sustain A Conviction For Drive-by Shooting.

Based on the above argument, the evidence was also insufficient to sustain a conviction for a drive-by shooting. The

conviction should be reversed. *Green,* 94 Wn.2d at 221. The special verdict of being armed with a firearm must also be reversed. *Wright,* 131 Wn.App. at 479.

3. The Evidence Was Insufficient To Sustain A Conviction For Felony Harassment.

The due process clause requires the State to prove every element of a crime beyond a reasonable doubt. *Apprendi v. New Jersey,* 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 l.Ed.2d 435 (2000); U.S. Const. amends. VI, XIV; Const. art. 1, §22. The inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Salinas,* 119 Wn.2d 201, 829 P.2d 1068 (1992).

The State charged Mr. Groves with felony harassment as follows:

> He, the said Joel M. Groves, in the State of Washington, on or about July 8, 2014, knowingly and without lawful authority, knowingly threatens to cause bodily injury immediately or in the future to the person; to wit: Da'Qwon Kessay, and harasses another person under subsection (1)(a)(i) of this section **by threatening to kill the person threatened** or any other person; thereby committing the felony crime of Felony Harassment; contrary to Revised code of Washington 9A.46.020(1)(a)(i) and (b)(ii).

(CP 236)(emphasis added).

The jury was given instruction number 18:

> To convict the defendant of the crime of harassment, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) that on or about July 8, 2014, **the defendant knowingly threatened to kill** Da'Qwon Kessay immediately or in the future;
>
> (2) That the words or conduct of the defendant placed Da'Qwon Kessay in reasonable fear that **the threat to kill would be carried out;**
>
> (3) That the defendant acted without lawful authority; and
>
> (4) That the treat was made or received in the State of Washington.

(CP 359)(emphasis added).

Thus, the State was required to prove Mr. Groves threatened to kill Kessay, and under the plain language of the felony harassment statute, also prove beyond a reasonable doubt that the Kessay was placed in reasonable fear that the threat to kill would be carried out as an element of the offense. *State v. C.G.,* 150 Wn.2d 604, 612, 80 P.3d 594 (2003).

The State's evidence falls far short. The State presented no evidence and Kessay never said he heard anyone make any kind of a threat toward him. Rather, the State's witnesses testified as follows: Kennedy said he heard an "older man" say, "Oh, I got something for you." (3RP 591). Devon Lowe reported he heard an

older male voice say, “Dizzy I got something for you.” (3RP 469). Adams heard someone say, “Come outside so I can beat your ass.” (3RP 559). Hanson testified that people often mistake him for an older male because of his deep voice. (3B RP 671).

In *C.G.* the Court found the nature of a threat depends on all the facts and circumstances, and not limited to the inquiry of a literal translation of the words spoken. *Id.* at 611. Here, however, none of the alleged statements was even a hint at a threat to kill. Moreover, there was no evidence that Kessay heard the statements. Thus, he could not be placed in reasonable fear that any threat would be carried out. Lastly, no witness testified that it was Mr. Groves who made the statements. The conviction for felony harassment should be reversed and dismissed with prejudice. *Hickman,* 135 Wn.2d at 105.

4. The Evidence Was Insufficient To Sustain A Conviction For Unlawful Possession of A Firearm.

The State bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of a charged crime. *In re WInship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Here, the State failed to prove beyond a

reasonable doubt that Mr. Groves had in his possession or control a firearm, an essential element of RCW 9.41.040(1)(a).

The trial court defined Possession in jury instruction no. 20:

> Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is int eh actual physical custody of the person charged with possession.
> Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item. Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.
> In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the item, and whether the defendant had dominion and control over the premises where the item was located. No single one of these factors necessarily controls your decision. (CP 361).

Mr. Groves did not have actual possession of the gun. At the time it was found, it had been in the garbage at Koback's home

for approximately a month. The question for the jury then was whether Mr. Groves had constructive possession of the weapon. Knowledge of the presence of contraband, without more, is insufficient to show dominion and control to establish constructive possession. *State v. Hystad,* 36 Wn.App. 42, 49, 671 P.2d 793 (1983).

As argued above, the two people who place a gun in Mr. Groves' hand were Koback and Mr. Groves himself. Groves said he handled the gun when he took it from Koback to see if it had been fired. His fingerprints were nowhere on the gun, and the only DNA found on the gun is consistent with his testimony that he checked the gun. Koback testified that Groves handed him the gun in the car. The weapon was found in the garbage at Koback's home a month later. Groves did not live at that home. Although credibility determinations are for the jury, combined with the lack of evidence that places the gun in Mr. Groves' control, the evidence does not add up to proof beyond a reasonable doubt that he either constructively or actually possessed the weapon.

Because a conviction based on insufficient evidence cannot stand, the conviction must be reversed and the charged dismissed with prejudice. *Hickman,* 135 Wn.2d at 105.

B. The Court Exceeded Its Statutory Authority When It Imposed The Firearm Enhancement Of 36 Months For The Drive-By Shooting Conviction.

Whether a sentence is legally erroneous is reviewed *de novo. State v. Jacobs,* 154 Wn.2d 596, 600, 115 P.3d 281 (2005). A trial court only possesses the power to impose sentences provided by law. *In re Pers. Restraint of Carle,* 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

RCW 9.94A.533 provides the statutory guidelines for adjustments to standard sentences. If an offender was armed with a firearm at the time the crime was committed, 60 months may be added to the base sentence if the felony is defined as a Class A felony; 36 months for any felony defined as a class B felony; and 18 months for any felony defined as a class C felony[4]. However, under RCW 9.94A.533(f) certain felonies are not subject firearm enhancements: the statute specifically prohibits attaching a firearm enhancement to a sentence for a drive-by shooting conviction.

Without conceding the argument that the evidence was insufficient, Mr. Groves contends the 36 months firearm

[4] The Statute provides either class A or statutory maximum of at least 20 years; class B or a statutory maximum of 20 years; and class C or a statutory maximum of 5 years. RCW 9.94A.533(3)(a-c).

enhancement, which was imposed on the drive-by shooting conviction, violates the statute. The appropriate remedy is to remand for removal of the 36 month term which would have been served consecutive to the assault 1 and all other firearm enhancements, in accordance with RCW 9.94A.533(3)(f).

C. The Court Exceeded Its Statutory Authority When It Imposed A Sentence That Exceeded The Statutory Maximum For The Offense Of Felony Harassment.

Sentencing is a legislative power, not a judicial one. *State v. Bryan,* 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). A trial court's decision to impose sentence is limited to what is authorized by the statute. *In re Pers. Restraint of Carle,* 93 Wn.2d at 33. Here, the court imposed a 55 month sentence with an additional 18 months for the firearm enhancement, totaling 73 months. Under the operation of RCW 9.94A.533(3)(g), if the addition of a firearm enhancement increases the sentence so that it exceeds the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced. The statutory maximum for a class C felony is 60 months. RCW 9.94A.533(3)(c).

Because the firearm enhancement cannot be reduced, the remedy is to remand to the trial court to reduce the standard range sentence to 42 months such that he will serve a total of no more than the maximum 60 months, which would include the firearm sentencing enhancement.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Groves respectfully asks this Court to reverse and dismiss with prejudice all of the convictions. In the alternative, he asks this Court to remand to the trial court for removal of the firearm enhancement for the drive-by shooting conviction and reduction of the sentence for felony harassment to comply with the statutory regulation.

Respectfully submitted this 30th day of November, 2015.

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Joel M. Groves, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Opening Brief was sent by first class mail, postage prepaid on November 30, 2015 to:

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